

TRI COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-269

Decided February 21, 1985

Appeal from a decision of Administrative Law Judge Michael L. Morehouse, dismissing a petition for review of a proposed civil penalty for failure to make timely prepayment of the amount of the proposed penalty.

Petition for discretionary review denied.

1. Appeals -- Rules of Practice: Appeals: Generally -- Surface Mining Control and Reclamation Act of 1977: Appeals: Generally -- Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally -- Surface Mining Control and Reclamation Act of 1977: Hearings: Generally

Under 43 CFR 4.127(a), a party may not file a "notice of appeal" with the Board of Land Appeals from an order or decision of an Administrative Law Judge disposing of a civil penalty proceeding. Instead, any party seeking review of an order or decision in a civil penalty proceeding may file a petition for discretionary review with the Board under 43 CFR 4.1158 and 4.1270.

2. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally -- Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Prepayment -- Surface Mining Control and Reclamation Act of 1977: Hearings: Generally

Under sec. 518(c) of Surface Mining Control and Reclamation Act and 43 CFR 4.1152(b), a petition for review of a proposed civil penalty must be accompanied by full payment of the proposed assessment. Timely prepayment of the amount of a proposed civil penalty by one seeking review of the penalty is essential to establish the jurisdiction of the Hearings Division and the Board of Land Appeals. Where prepayment is not made until after the deadline for filing the petition for review, the

petitioner has failed to make timely prepayment, and the petition must be denied.

Addington Brothers Mining, Inc. v. OSM, 2 IBSMA 60 (1980), 2 IBSMA 89 (1980), overruled.

APPEARANCES: David A. Ellwood, Esq., Cambridge, Ohio, for petitioner.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

On January 19, 1982, the Tri Coal Company (Tri Coal) filed with the Hearings Division, Office of Hearings and Appeals, a petition for review of a proposed civil penalty of \$22,500 issued by the Office of Surface Mining Reclamation and Enforcement (OSM) for Cessation Order No. 81-3-7-6. The petition was not accompanied by a check for the amount of the proposed penalty. On March 10, 1982, OSM filed a motion to dismiss the petition, citing Tri Coal's failure to comply with the prepayment requirement of section 518(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1268(c) (1982), and 43 CFR 4.1152(b), and failure to file a petition for review that conformed to the requirements of 43 CFR 4.1152(a).

On March 18, 1982, Administrative Law Judge Sheldon L. Shepard issued an order granting Tri Coal 10 days from receipt of the order to file an amended petition that fulfilled the requirements of 43 CFR 4.1152(a) and to prepay the amount of the penalty. Tri Coal received this order on March 20, 1982.

On March 29, 1982, Tri Coal filed an amended petition for review of the proposed civil penalty, along with a check for \$22,500. On March 31, 1982, Judge Shepard issued an order ruling that Tri Coal had "satisfied the Order of March 18, 1982," and that "the amended petition is accepted for filing."

The case was subsequently reassigned to Administrative Law Judge Michael L. Morehouse, who conducted a hearing on May 22, 1984, in Pittsburgh, Pennsylvania. Judge Morehouse stated at the outset of the hearing that Tri Coal's failure to prepay the amount of the civil penalty within 30 days of its receipt of the proposed assessment is "jurisdictional and even on a failure of OSM to * * * move to dismiss the case on that basis, I should do so" (Tr. 3). Nevertheless, he determined that it was appropriate to proceed with the hearing, so that if the question of the failure to prepay were resolved in Tri Coal's favor, there would be a record on which to base an alternative ruling (Tr. 4).

On December 18, 1984, Judge Morehouse issued a decision dismissing the petition. He ruled that Tri Coal's failure to pay the amount of the proposed civil penalty within 30 days of being informed of the penalty deprived him of jurisdiction to consider the petition for review, citing section 518(c) of SMCRA; Comet Mining Corp. v. OSM, 4 IBSMA 122 (1982); and David Excavating Corp., 4 IBSMA 2 (1982). He concluded: "In the present case, there was prepayment by petitioner, however, the prepayment was not timely. The statute and the regulation specifically requires [sic] timely prepayment." Judge Morehouse noted in his decision that he was reluctant to dismiss the petition "because of the special circumstances surrounding the prepayment of the proposed assessment in this case," but that he had no alternative.

On January 21, 1985, Tri Coal filed a "notice of appeal" of Judge Morehouse's decision.

[1] We note initially that Tri Coal does not have the right to file a notice of appeal of the December 18, 1984, decision. The action which it seeks to appeal is the disposition of a civil penalty proceeding initiated pursuant to 43 CFR 4.1150. The regulations expressly state that filing a notice of appeal is the appropriate way to seek review of orders or decisions of Administrative Law Judges disposing of proceedings "except a civil penalty proceeding under § 4.1150." 43 CFR 4.1271(a) (emphasis supplied).

43 CFR 4.1158 specifies that a "party may petition the Board to review the decision of an administrative law judge concerning an assessment according to the procedures set forth in § 4.1270." See also 43 CFR 4.1270(a). 43 CFR 4.1270(b) provides that a petition for discretionary review "shall be filed on or before 30 days from the date of receipt of the decision sought to be reviewed and the time for filing may not be extended." Tri Coal's "notice of appeal" of the December 18, 1984, decision was not filed (i.e., mailed, see 43 CFR 4.1107(g)) until January 21, 1985, but since the case file contains no certified mail return receipt card indicating when the decision was received, we will assume that the filing was timely. 43 CFR 4.1270(c) provides that a petitioner "shall list the alleged errors of the administrative law judge and shall attach a copy of the order of decision sought to be reviewed." Failure to comply with these 4.1270(c) requirements subjects the petition to denial. Cf. Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969); Pressentin v. Seaton, 284 F.2d 195 (D.C. Cir. 1960). 1/ In this case no decision is attached and the letter states only: "The basis of the appeal is the order of March 18, 1982, which granted the Petitioner ten days in which to file an amended petition and pay the amount of the proposed assessment into escrow as required by the act and the regulations." We will treat the letter as a petition for discretionary review.

[2] Even treating Tri Coal's letter as an adequate petition for discretionary review, however, it must be denied. Section 518(c) of SMCRA provides that a person charged with a civil penalty has 30 days from being informed of the proposed amount "to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount of the penalty to [the Department] for placement in an escrow account." This provision has been implemented at 30 CFR 723.19(a) and 845.19(a) and 43 CFR 4.1152(b). The latter regulation provides: "The petition [for review of a proposed civil penalty] shall be accompanied by full payment of the proposed civil penalty." 43 CFR 4.1152(c) provides: "As required by section 518(c) of the act, failure to make timely payment of the proposed assessment in full shall result in a waiver of all legal rights to contest the violation or the amount of the penalty." 2/

1/ Addington Brothers Mining, Inc. v. OSM, 2 IBSMA 61 (1980), petition for reconsideration denied, 2 IBSMA 89 (1980), is overruled.

2/ Three Federal Circuit Courts of Appeals have upheld the prepayment requirement against constitutional challenges. Graham v. OSM, 722 F.2d 1106 (3rd Cir. 1983); Blackhawk Mining Co. v. Andrus, 711 F.2d 753 (6th Cir. 1983); B & M Coal Corp. v. OSM, 699 F.2d 381 (7th Cir. 1983).

Since 1979 it has been consistently held that prepayment of the amount of a proposed civil penalty by one seeking review of that penalty is essential to establish the jurisdiction of the Hearings Division and the appropriate board of appeals, so that failure to make prepayment mandates dismissal of a petition for review and denial of a petition for discretionary review, respectively. ^{3/} Comet Mining Corp. v. OSM, 4 IBSMA 177 (1982); Bryar Construction Corp., 2 IBSMA 196, 197 (1980); Badger Coal Co., 2 IBSMA 147, 152, 87 I.D. 319, 322 (1980); Big Delta Minerals, Inc., 2 IBSMA 32 (1980); and C & K Coal Co. v. OSM, 1 IBSMA 118, 86 I.D. 221 (1979). This Board has applied this rule in several recent orders: Stanley Finley v. OSM, IBLA 85-111 (Nov. 29, 1984); Thomas & Miller Coal Co. v. OSM, IBLA 85-45 (Nov. 7, 1984, petition for reconsideration denied, Dec. 7, 1984); L.W. Overly Coal Co., IBLA 84-842 (Dec. 6, 1984). ^{4/} Where prepayment is not made

^{3/} Effective Apr. 26, 1983, the Board of Surface Mining and Reclamation Appeals was abolished and its functions and responsibilities were transferred to the Interior Board of Land Appeals (IBLA). 48 FR 22370 (May 18, 1983).

^{4/} In Stanley Finley, *supra*, we stated:

"Prepayment of the amount of a proposed civil penalty by one seeking review of that penalty is essential to establish the jurisdiction of both the Hearings Division and the Board of Land Appeals to entertain the petition. 43 CFR 4.1152(b) and (c). Thus, not only does petitioner's failure to prepay deprive this Board of jurisdiction to hear his petition for discretionary review, Administrative Law Judge Torbett also lacked jurisdiction to address the applicability of the 2-acre exemption and the other issues raised before him by petitioner. Under 43 CFR 4.1152(c), 'failure to make timely payment of the proposed assessment in full shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.' The waiver of all legal rights includes a waiver of the right to assert all defenses to the assessment of the proposed penalty, including, but not limited to, defenses of lack of subject matter or personal jurisdiction."

In Thomas & Miller Coal Co., *supra*, in response to the argument that prepayment is not required as a prerequisite to arguing that OSM has no jurisdiction over a petitioner, we stated in denying the petition for reconsideration:

"Prepayment is required from a person seeking review of a proposed civil penalty assessment either on the basis of lack of jurisdiction or on the merits of the violation or the amount of the proposed penalty. The Department is not authorized to provide for a special appearance without prepayment on jurisdictional issues before proceeding to a hearing on the merits after prepayment if the jurisdictional issues are resolved in favor of the Department. Prepayment entitles one to review of all issues of law and fact raised by the proposed assessment; failure to prepay constitutes a waiver of all legal rights to contest the proposed penalty on jurisdictional, legal, or factual grounds. Lack of jurisdiction on the part of Office of Surface Mining Reclamation and Enforcement (OSM) may be raised by a petitioner only after prepayment."

In L. W. Overly, *supra*, we denied a petition for discretionary review where prepayment was made after the time allowed in 43 CFR 4.1151, even though petitioner had apparently relied on statements made by the Office of the Field Solicitor after the deadline for prepayment when he filed the proposed assessment.

until after the deadline for filing the petition for review, the petitioner has failed to make timely prepayment, and the petition may not be considered. C & K Coal Co., supra. 5/

Although appellant did make prepayment in this case, it failed to make timely prepayment. Appellant's original petition for review is dated January 15, 1982, and specifically refers to the amount of the proposed assessment, \$22,500. Thus, it is clear that appellant had received notice of the proposed assessment no later than January 15, 1982.

Appellant did not make prepayment until March 31, 1982, more than 2 months after it received notice of the proposed assessment from OSM. Thus, its payment was untimely under the provisions of section 518(c) of SMCRA, which expressly require full payment be made not later than 30 days after being informed of the proposed penalty. The payment was also untimely under 43 CFR 4.1152(c), which provides that the petition for review must be filed within 30 days of receipt of the proposed assessment (43 CFR 4.1151(a)) and that full prepayment of the proposed assessment must accompany the petition (43 CFR 4.1152(b)(1)).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for discretionary review is denied.

Will A. Irwin
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

5/ In C & K Coal Co., supra, petitioner received the notice of proposed assessment on July 29, filed a petition for review with the Hearing Division on Dec. 18, and prepaid the proposed penalty on Jan. 8. The Board rejected the argument that petitioner's filing of an application for review of the notice of violation suspended the filing requirements for a petition for review of a proposed civil penalty. The order of the Administrative Law Judge stating that the Jan. 8 prepayment "perfected" the Dec. 18 petition and denying a motion to dismiss the petition, was reversed.

